FILED
JAN 25 1980
MICHAEL RODAK, JR., CLERK

79-1155

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1979

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**No. A-511**

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CAROL GARDNER, *Petitioner,*

v.

UNITED STATES OF AMERICA, *Respondent.*

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## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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The petitioner, Carol Gardner, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit in this case.

### OPINION BELOW

The judgment of the Court of Appeals was entered on November 28, 1979. *United States* v. *Irving Held and Carol Gardner*, No. 79-1273 (2d Cir. Nov. 28, 1979) (App. A *infra* 1a).

## JURISDICTION

On December 18, 1979, Mr. Justice Marshall extended the time for filing a petition for a writ of certiorari to and including January 27, 1980. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## QUESTIONS PRESENTED

1. Whether the scope of section 186(b) of the Labor Management Relations Act of 1947 permits an interpretation that the conduct proscribed includes not only "loan" but "caused a loan to be made."

2. Whether a conviction under section 186(b) is constitutionally permissible where there was no evidence that petitioner *knew* that the "employer" made the loans or "caused the loans to be made."

## STATUTES INVOVLED

1. 29 U.S.C. 186 provides in pertinent part:

(a) It shall be unlawful for any employer or association of employers or any person who acts as a labor relations expert, advisor, or consultant to an employer or who acts in the interest of an employer to pay, lend, or deliver, or agree to pay, lend, or deliver, any money or other thing of value—

* * *

(2) To any labor organization, or any officer or employee thereof, which represents, seeks to represent, or would admit to membership, any of the employees of such employer who are employed in an industry affecting commerce:

* * *

(b)(1) It shall be unlawful for any person to request, demand, receive, or accept, or agree to



receive or accept, any payment, loan, or delivery of any money or other thing of value prohibited by subsection (a) of this section.

* * *

(d) Any person who wilfully violates any of the provisions of this section shall, upon conviction thereof, be guilty of a misdemeanor and be subject to a fine or not more than $10,000 or to imprisonment for not more than one year, or both.

## STATEMENT

During 1976 and 1977, Carol Gardner, petitioner, was President of Local 1233 of the International Longshoreman's Association ("ILA") in New Jersey and was an organizer of the ILA in New York. During the same time, Irving Held, co-defendant below, was the President and owner of Sealand Terminal Corporation and subsidiary companies, including Held Warehouse and Transportation Company, United Terminal Company and Anchor Stevedoring Company. These companies were engaged in stevedoring, warehousing and trucking in the Port of New York and elsewhere and did more than $60 million in business. From July 28, 1976 through November 3, 1977, Held introduced petitioner to four individuals who made four separate and distinct loans to petitioner totaling $68,000.

Each of these loans, which ranged from $5,000 to $36,000, were made by a personal or business associate of Held as a result of Held's representation that petitioner was trustworthy and would repay the loan.

The indictment charged in counts five through eight, petitioner Carol Gardner, a union official, with receiving loans made by co-defendant Irving Held, an em-

ployer of union labor, in violation of Title 29, United States Code, section 186(b).

On July 31, 1979, following a jury trial in the United States District Court for the Southern District of New York, petitioner was convicted for violation of 29 U.S.C. 186(b) and sentenced to two concurrent one year terms of imprisonment on counts five through eight and to a $10,000 fine on each of those counts, to run consecutively, for a total fine of $40,000.

This case presents an important question as to the scope of 29 U.S.C. 186(b), the Labor Management Relations Act of 1947, as amended by the Labor Management Reporting and Disclosure Act of 1959.

## REASONS FOR GRANTING THE WRIT

### I. The Conclusions Of The Courts Below As To The Coverage Of 29 U.S.C. 186(b) Are Serious And Substantial Denials Of The Petitioner's Constitutional Rights.

The district court's and the court of appeals' interpretation of 29 U.S.C. 186(b) and (d) to include "cause to be made" and "knowledge" thereof was a denial of due process. In the district court, the jury charge in regard to petitioner for violation of 29 U.S.C. 186(b) was in pertinent part, as follows:

> "As to each of Counts 5 through 8, which charge Gardner with commission of a crime in order to convict the defendant Gardner on the count which you are considering, the government must prove to your satisfaction beyond a reasonable doubt each of the following elements:
>
> That the defendant Gardner requested or accepted or agreed to receive or accept the loan specified in the count, either directly from Held or indirectly from another person knowing that Held had wilfully [sic] caused the loan to be made." (Jt. App. 485).[1]



The court of appeals based its affirmation of petitioner's conviction on the following:

> "Gardner at the very least, knew that Held introduced him to each lender with the intent of arranging or inducing a loan. There was ample evidence that Gardner knew that Held was the cause of the loans to him." *United States* v. *Irving Held and Carol Gardner,* No. 70-1272 (2d Cir. Nov. 28, 1979 (App. A, 2a).

Such an interpretation, as used by the district court and acquiesed in by the court of appeals was unwarranted and unauthorized.

There is no language in 29 U.S.C. 186(b) which makes it illegal for a union representative to know that an employer of union members had caused a loan to be made to such representative. Subsection (d) of 29 U.S.C. 186 requires that the individual willfully violate subsection (b) of 29 U.S.C. 186.

Many courts have clearly described what constitutes a willful violation of 29 U.S.C. 186(b) by a union representative. These courts have established that the union representative must have accepted or received payments from an employer of union members (1) with knowledge that he was accepting or receiving such payments; and (2) with knowledge that the payments came from the employer of employees that he represented. *See eg., United States* v. *Pecora,* 494

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[1] "Jt. App." refers to the Joint Appendix filed in the court of appeals.

F. 2d 1289 (3d Cir. 1973), *United States* v. *Keegan,* 331 F. 2d 257 (2d Cir. 1964), *United States* v. *Alaimo,* 297 F. 2d 604 (3d Cir. 1961), *cert. denied,* 369 U.S. 817. Research has disclosed no case holding that it is unlawful within 29 U.S.C. 186(b) for the union representative to know that an employer has caused a loan to be made to such representative. The interpretation of 29 U.S.C. 186(b) as formulated by the district court and as maintained by the court of appeals was a distinct deviation from the proper interpretation of the aforementioned statute and was therefore unwarranted.

"It is the legislature, not the court, which is to define a crime, and ordain its punishment." *United States* v. *Wiltberger,* 18 U.S. (Wheat.) 76, 95 (1820); *United States* v. *Halseth,* 342 U.S. 277 (1952); *Kirchman* v. *United States,* 256 U.S. 363 (1921).

The lower courts' construction of 29 U.S.C. 186(b) is repugnant to a fundamental concept embraced by the federal judiciary for the interpretation of a criminal statute. It has long been recognized that a criminal statute must be interpreted narrowly so as to put the individual on notice as to what conduct is proscribed. The statute here involved created a new offense not heretofore known to statute or common law. The coverage of such a statute may not be extended beyond what clearly appears from its explicit language. *Connally* v. *General Construction Co.,* 269 U.S. 385, 391 (1926).

The interpretation invoked by the district court and the court of appeals to comprise a willful violation of 29 U.S.C. 186(b) does not emerge with the clarity



which should be found in a criminal statute. The court of appeals stated:

> "Gardner at the very least knew that Held introduced him to each lender with the intent of arranging or inducing a loan. There was ample evidence that Gardner knew that Held was the cause of the loans to him." *United States* v. *Irving Held and Carol Gardner,* (App. A, 2a).

The language of 29 U.S.C. 186(b), in the narrow construction of a criminal statute, cannot be reasonably interpreted to include the type of knowledge or conduct which the lower courts found sufficient to convict petitioner under 29 U.S.C. 186(b).

The interpretation given to 29 U.S.C. 186(b) by the district court and the court of appeals, if permissible, renders the statute void for vagueness and over breadth.

It has long been established that ". . . the language of the statute (charging a criminal offense) must convey sufficiently definite warning as to the proscribed conduct when measured by common understanding and practices." *North American Van Lines, Inc.* v. *United States,* 243 F.2d 693, 697 (6th Cir. 1957). The courts below have interpreted 29 U.S.C. 186(b) to include as unlawful petitioner's knowledge that Held "caused" a loan to be made to petitioner. The effect of the various interpretations which may be reasonably applied to "cause" literally opens a Pandora's box as to the possible meanings and interpretations which could be made concerning what is included and excluded from section 186(b). Thus, the statute ". . . either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its

meaning and differ as to its application. . . ." *Connally* v. *General Construction Co., supra.*

The statute, as interpreted by the lower courts, must be defective for over breadth. Apart from the problem of the vagueness, this Court has held that a criminal statute is void if the statute, either on its face or as authoritatively construed, while reaching conduct that may lawfully be punished, is nevertheless so broad in its sweep that it may be used to punish constitutionally protected conduct. *See e.g., Thornhill* v. *Alabama,* 310 U.S. 88 (1940); *Aptheker* v. *Secretary of State,* 378 U.S. 500 (1964); *Edwards* v. *South Carolina,* 372 U.S. 229 (1963); *Cox* v. *Louisiana,* 379 U.S. 536 (1965).

The interpretation of 29 U.S.C. 186(b) by the lower court prohibits conduct clearly outside its realm and serves to make unlawful that which is protected by the Constitution of the United States.

**II. The Decision Below Was Shockingly Wrong And A Blatant Denial Of Due Process**

Rather than review for corrections of errors in fact-finding, we submit that this Court should grant review because of the substantial due process questions presented. In *Thompson* v. *City of Louisville,* 362 U.S. 199 (1960), the Court recognized that a conviction "totally devoid of evidentiary support" is unconstitutional under the Due Process Clause of the Fourteenth Amendment. Further, in *Thompson* the Court stated that the decision of this question "turns not on the sufficiency of the evidence, but on whether [the] conviction rests upon any evidence at all." Similarly, in *In Re Winship,* 397 U.S. 358 (1969), the Court explicitly held "that the Due Process Clause protects the



accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." The decisions below cannot be reconciled with these established principles.

In the instant case petitioner Gardner was found guilty under 29 U.S.C. 186(b) of four counts (counts five through eight) of receiving loans indirectly from Irving Held, whose companies employed workers represented by petitioner. An analysis of the trial proceeding reveals the total absence of any evidence or facts from which constitutionally permissible inferences could be drawn that petitioners had the requisite knowledge to sustain a conviction under 29 U.S.C. 186(b).

**The Herzfeld Loan**

***Count Five***

Herzfeld, a friend of Held's and, like Held, a member of the Young Men's Philanthropic League in New York, was the owner of a carpet manufacturing company (Jt. App. 40-41).

In April 1976, Held told Herzfeld that he had a friend who wanted to borrow $15,000 to invest in a bowling alley and that his friend was a fine, honest and capable man who would repay any money he borrowed (Jt. App. 53,132).[2] Herzfeld told Held that if Held would set up a meeting with the prospective borrower, Herzfeld would lend Held's friend the money (Jt. App. 53).

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[2] Herzfeld testified that there were many occasions when members of the Young Men's Philanthropic League would make loans to businessmen in financial difficulty in order to help them out (Jt. App. 119-132).

The next day, Held brought petitioner to Herzfeld's office. After introducing petitioner to Herzfeld, Held left. Petitioner then told Herzfeld that he wanted to borrow $15.000 to invest in a bowling alley. Herzfeld asked petitioner when he could repay the loan, and petitioner replied that he would be able to pay it back at the rate of $1,000 per month starting in January 1977 (Jt. App. 54). Herzfeld agreed to make the loan at the rate of 8½ percent interest and gave petitioner a series of fifteen notes at the rate of interest agreed upon reflecting petitioner's indebtedness to Herzfeld. Herzfeld then gave petitioner a check for $15,000. *Id.*

Approximately ten to twelve days later, Held asked Herzfeld if he had made the loan to petitioner; Herzfeld replied that he had. Held noted that Herzfeld was generally short of cash. While Herzfeld agreed that he was, he said that he could manage. Nevertheless, Held offered to give Herzfeld a check for $15,000, which Herzfeld at first refused but then accepted with the understanding that Herzfeld would repay the money to Held as petitioner repaid his loan (Jt. App. 58-59). Petitioner was not present during that conversation, and there was no evidence that petitioner knew about this arrangement. Thereafter, petitioner repaid the loan in full to Herzfeld, and Herzfeld repaid Held (Jt. App. 61-62).

In September of 1976, petitioner telephoned Herzfeld and asked if he could borrow an additional $10,000 to invest in his bowling alley. Herzfeld agreed to make the additional loan and prepared a series of notes reflecting a rate of interest of 8½ percent. Herzfeld gave petitioner his check for $10,000 (Jt. App. 63-63, 67). Only after the loan was made did Herzfeld tell Held about it (Jt. App. 64). Thereafter, Herzfeld made two



more loans to petitioner for $1,500 and $2,000 respectively (Jt. App. 67). Herzfeld never told Held about the last two loans (Jt. App. 137-138).

On or about November 22, 1976, Held gave Herzfeld a check for $50,000 and asked Herzfeld to write three checks, one to Larry Korman for $15,000, another to David Carr for $12,000, and a third to Irving Held for $15,000. Herzfeld wrote the checks in accordance with Held's request (Jt. App. 100-102). Thereafter, Korman paid Herzfeld $15,000, and Herzfeld wrote a check to Held in that amount. There was no evidence that petitioner participated in or was aware of that transaction (Jt. App. 107-108).

**The Carr Loan**

***Count Six***

David Carr, an insurance agent, earned between $50,000 and $60,000 in commissions on insurance written for Irving Held's companies. This represented about 20 percent of Carr's annual income (Jt. App. 165-166).

Carr first met petitioner in November 1976, when petitioner visited Carr at his office. Petitioner told Carr that Irving Held had informed him that Carr would have a check for petitioner for $12,000. Carr said that he did not know anything about it, and he tried unsuccessfully to reach Held (Jt. App. 168).

A day or two later, Carr told Held about petitioner's visit. Held explained that he had meant to ask Carr if he would lend petitioner $12,000 to invest in a bowling alley but that the matter had slipped his mind. Held described petitioner as a good, upright citizen and a reliable individual. He further stated that petitioner

would probably want a six month loan. Held told Carr to decide for himself whether or not he wanted to make the loan (Jt. App. 168-169).

Shortly thereafter, petitioner met with Carr again and asked him if he would lend petitioner the money; Carr said that he would. Petitioner stated that he wanted to make his first payment in six months and pay off the loan in one year (Jt. App. 171). Petitioner signed six notes, one for each month. The rates provided for interest at the prevailing bank rate. *Id.*

A few days after making the loan, Carr told Held that he had lent $12,000 to petitioner but that he had thought before making the loan that it would be paid in six months rather than one year. Held replied that Carr did not have to worry about the loan and that he would see that petitioner repaid it. However, about one week later, Held gave Carr a check for $12,000, as repayment of the loan in full. Carr sent the notes to Held (Jt. App. 174). Carr testified that Held took over the loan because Carr complained to Held that initially he understood that the loan would be repayable in six months, but petitioner insisted on a loan payment over one year (Jt. App. 188-189). Petitioner repaid the loan to Carr in full (Jt. App. 174). There was no testimony that petitioner had any knowledge of the transactions between Held and Carr.

**The Selby Loan**

***Count Seven***

Murray S. Selby, a lawyer, testified that he had known Irving Held for about 20 years and did various kinds of commercial work for the Held companies (Jt. App. 195-198). In December 1976, Irving Held tele-



phoned Selby and said that he was coming to Selby's office with somebody who wanted some help. The evidence shows that Held introduced Gardner to Selby and vouched for him. Petitioner stated that he needed $5,000 for his bowling alley business (Jt. App. 201). Selby asked Held, "Is it okay?" Held said that it was. Petitioner then said that he would pay the money back at the rate of $1,000 per month with interest starting in March or April 1977. Selby made out five notes, payable in monthly installments with interest, and gave them to petitioner to sign. Sometime thereafter, petitioner picked up a check for $5,000 (Jt. App. 202-203). Petitioner repaid the loan in full (Jt. App. 205-206). There was no evidence that Gardner knew anything at all about the business relationship between Held and Selby or that Gardner was aware of anything that tended to show that Selby was acting for Held and not for himself.

**The Korman Loan**

***Count Eight***

In November 1977, Held, petitioner and Nathan Korman were having dinner together at the Young Men's Philanthropic League in New York. At one point, Held left the table and petitioner and Korman carried on a conversation between themselves. In the course of that conversation, Gardner stated that he was looking for someone to lend him $36,000 to invest in the laundromat business (Jt. App. 245). Korman was very impressed with petitioner and his proposed business venture and told Held, out of petitioner's presence, that if he had the money, he would lend the $36,000 to petitioner. Held replied that if Korman thought it was such a good deal, Held would lend Kor-

man the money (Jt. App. 246). Within the next several days, Korman received four checks from Held totaling $36.000 (Jt. App. 247). There was no evidence that petitioner knew that Held loaned money to Korman. Thereafter, Korman arranged to lend $36,000 to Gardner for one year with interest at the rate of $250 per month at 8⅓ percent interest (Jt. App. 247, 257).

The proof as to each count does not satisfy the *Winship* requirements. First, the record is entirely barren of facts from which the jury could infer beyond a reasonable doubt that Gardner knew that Held in fact was making the loans or causing the loans to be made in a manner violative of the statute. There was no evidence, nor could a proper inference be drawn that the petitioner knew that the lenders were acting in Held's interest or that the lenders were conduits between Held and Gardner. Mere suspicion that Gardner must have known that the lenders were acting for Held is not enough. The facts are grossly insufficient to support the jury's implicit finding that petitioner had knowledge either that Held made the loans improperly or illegally caused the loans to be made. It cannot be said that this inference is the only one that can fairly and reasonably be drawn from the facts in the instant case and that any other explanation is fairly and reasonably excluded.

Moreover, even if the facts support the conclusion that Held caused or arranged the loans, there was no evidence whatsoever that petitioner was aware of any such relationship between Held and the lenders so that petitioner knew that the loans were being made on behalf of Held. Absent proof beyond a reasonable doubt that petitioner had such knowledge, the conviction cannot stand.



**III. This Court Should Exercise Its Powers Of Supervision To Correct The Miscarriage Of Justice Implicit In The Decisions Below**

Petitioner respectfully submits that this Court should exercise its supervisory authority over the administration of criminal justice in the federal courts to correct the miscarriage of justice implicit in the decisions below.

The decisions of the courts below are disturbing, both in their departure from the procedure normally followed in addressing statutory and constitutional questions and in their disregard of decisions of this court as reflected in the explicit holding of *Winship*. The exercise of this Court's supervisory powers *(McNabb* v. *United States,* 318 U.S. 332 (1943)) in the instant case seems especially warranted in light of the discussion above and in view of the questions presented concerning the scope of section 186(b) of the Labor-Management Relations Act of 1947, as amended, as a result of the decisions of the lower courts.

## CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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# APPENDIX

## APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the 28th day of November, one thousand nine hundred and seventy-nine.

Present: HON. WILLIAM H. TIMBERS
HON. ELLSWORTH A. VAN GRAAFEILAND
HON. JON O. NEWMAN
Circuit Judges

Docket No. 79-1273

UNITED STATES OF AMERICA, Appellee,

v.

IRVING HELD and CAROL GARDNER, Appellants.

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgments of said District Court be and they hereby are *affirmed*.

Appellants, Irving Held and Carol Gardner, were convicted after a jury trial for violations of 29 U.S.C. § 186(a) and 18 U.S.C. § 2, and 29 U.S.C. § 186(d), respectively. The evidence at trial established that Held (an employer) illegally caused loans to be made to Gardner (a union official) and Gardner illegally accepted these loans. On appeal, the issues are:

(1) Whether the evidence was sufficient to sustain the convictions of both appellants;

(2) Whether the admission of evidence of the withdrawal of $50,000 from United Terminals, Inc., by Held and its subsequent disbursement violated Fed. R. Evid. 404(b);

(3) Whether the admission in evidence of charts summarizing the government's exhibits was improper; and

(4) Whether accumulated errors at trial, including alleged errors in the charge to the jury, limitations on final summation, and the admission of evidence subject to connection, require reversal.

We shall briefly state our rulings on each of these issues.

(1) With regard to the first issue, we conclude that the evidence clearly was sufficient to sustain the jury convictions of both appellants. The evidence, viewed as we must at this stage in the light most favorable to the government, showed that Held caused four of his friends and associates to make loans to Gardner, and Gardner accepted these loans knowing that they were brought about by Held's actions. In each instance, an individual who either was heavily indebted to Held or was dependent on Held for business made loans to Gardner, a stranger, on no more than Held's suggestion. None of these individuals was in a position to refuse to make the loan. Moreover, in several instances Held either effectively assumed the loan himself after the transaction or provided the money for the loan. Gardner, at the very least, knew that Held introduced him to each lender with the intent of arranging or inducing a loan. There was ample evidence that Gardner knew that Held was the cause of the loans to him.

(2) Held contends that the district court erred in admitting evidence of a "similar act" in violation of Fed. R. Evid. 404(b), and that he was unfairly prejudiced by the admission of this evidence. But the evidence—which involved the falsification of the books of United Terminals to show that Gerald Herzfeld had repaid a $50,000 loan—



was not evidence of a "similar act". Rather, it was admitted to show that Held in fact had caused one of the loans to Gardner, that Held arranged loans to Gardner partly to make a profit himself, and that Held knowingly had attempted to conceal the financing of loans to Gardner. Furthermore, there was no unfair prejudice to appellants, since the government was not allowed to represent that the incident itself constituted a "crime".

(3) Appellants argue that the admission of charts summarizing government exhibits requires reversal. We disagree. Contrary to appellants' contentions, Fed. R. Evid. 1006 does not prohibit such charts simply because the underlying evidence also has been admitted in evidence. *See United States* v. *Scales*, 594 F.2d 558, 562 (6 Cir. 1979). Nor does Rule 1006 prohibit such charts simply because the underlying evidence is not literally too voluminous for the jury to digest. *Id.* The charts were neither inaccurate nor inflammatory; moreover, the district judge gave limiting instructions that the jury should regard the charts merely as the government's "contentions".

(4) Finally, we reject appellants' claim that a so-called accumulation of errors at trial requires reversal. We are not persuaded by appellants' argument that certain evidence admitted "subject to connection" was never connected, and we reject the claim that such evidence was prejudicial. The alleged errors in the jury charge relating to inferences and aiding and abetting are without merit. The district judge did not abuse his discretion in instructing counsel in their summations not to refer to the jury's right to have portions of the trial testimony re-read.

Affirmed.

/s/ WILLIAM H. TIMBERS
William H. Timbers

/s/ ELLSWORTH A. VAN GRAAFEILAND
Ellsworth A. Van Graafeiland

/s/ JON O. NEWMAN
Jon O. Newman